

FCC MAIL SECTION

APR 2 2 37 PM '93

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

COPIED FOR FILE
ORIGINAL
W

DISPATCHED BY

In the Matter of)

Implementation of Section 10 of the)
Cable Consumer Protection and)
Competition Act of 1992)

MM Docket No. 92-258 ✓

Indecent Programming and Other Types)
of Materials on Cable Access Channels)

SECOND REPORT AND ORDER

Adopted: March 25, 1993

Released: April 2, 1993

By the Commission: Commissioner Marshall not participating.

I. Introduction

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. §1460. Section 10(c) of the new Act expressly provides:

Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

2. On November 5, 1992, we adopted a Notice of Proposed Rule Making, 7 FCC Rcd 7709 (1992), seeking comment on proposals to implement section 10, including subsection (c) noted above. On February 1, 1993, we adopted a First Report and Order ("First Report"), 8 FCC Rcd 998 (1993), to implement section 10(b) of the new Act, which requires cable operators to block indecent programming on commercial leased access channels of cable systems unless subscribers specifically request access to such programming in writing. In the First Report, we stated that rules to implement section 10(c) of the Act, would be adopted at a subsequent date.

This Second Report and Order, adopted today, constitutes our implementation of section 10(c) of the Act, as required under the 1992 Cable Act.

3. We received comments in this proceeding from cable operators, cable access organizations, governmental authorities, and others who might be directly or indirectly affected by cable operator-imposed restrictions on public, educational, and governmental ("PEG") access channels.¹ In the paragraphs that follow, we discuss the major issues raised by the commenters as they relate to section 10(c) and its implementation and the conclusions we reach on these matters.²

II. Relevant Statutory Provisions

4. To provide an overall understanding of the issues involved in this proceeding, we shall first outline the relevant statutory provisions in the existing Communications Act of 1934, as amended, and the new Cable Act. First, section 611 of the Act, 47 U.S.C. §531, provides that franchising authorities "may establish requirements . . . with respect to the designation of channel capacity for public, educational, or governmental use . . ." 47 U.S.C. §531(a). Thus, unlike the commercial leased access channel requirements of section 612 of the Communications Act, 47 U.S.C. §532, cable operators are not required by the Communications Act to provide public, educational or governmental access channels. Rather, the Act allows, but does not require, franchising authorities to impose PEG obligations. In addition, sections 611(b) and 611(c), 47 U.S.C. §531(b) and (c), state that a franchising authority "may require rules and procedures for the use of the channel capacity designated pursuant to this section" and "may enforce any requirement in any franchise regarding the providing or use" of such channel capacity.

5. Section 611(e), 47 U.S.C. §531(e), expressly prohibits cable operators from exercising "any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section." That provision is subject to section 624(d), 47 U.S.C. §544(d), which allows a franchising

¹ A list of the commenters in this proceeding is provided in Appendix B.

² Just as we stated in the First Report regarding commercial leased access, the question of which persons or entities should be required to bear the costs and expenses that arise when cable operators choose to prohibit materials under section 10 is more appropriately addressed in the cable rate regulation proceeding. See Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 92-544 (adopted December 10, 1992; released December 24, 1992).

authority and a cable operator to specify, in a franchise or renewal thereof, that certain services shall not be provided or shall be provided subject to conditions, if such services are "obscene or otherwise unprotected by the Constitution of the United States." Section 611(i) is now further subject to section 10(c) of the 1992 Cable Act, which, as noted above, permits cable operators to exercise editorial control over PEG channels for the limited purposes of prohibiting "programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, as noted in the First Report and Order, section 10(d) of the new Cable Act amended section 638 of the Communications Act, 47 U.S.C. §548, by removing cable operators' immunity for programs that involve obscene materials on any of the access channels (leased and PEG alike).³ Having outlined the relevant statutory provisions, we shall now turn to the issues at hand.

III. Constitutionality of Section 10(c)

6. As noted in the First Report, many commenters, including cable operators, access organizations and access users, challenged the constitutionality of section 10 of the new Cable Act, although, in some instances, for completely different reasons. Many of the arguments addressed therein were not limited to sections 10(a) and 10(b) of the new Cable Act relating to commercial leased access but were also directed to section 10(c) as it applies to the PEG channels. On the other hand, some cable interests, for example NCTA, maintain that to the extent section 10 affords cable operators the discretion to prohibit such materials on the PEG channels, it simply restores some of their first amendment rights on such channels.⁴

Discussion

7. In the First Report, we rejected a constitutional challenge that section 10(a), which permits cable operators to prohibit indecent programming through a written and published policy, constitutes "state action" and is therefore unconstitutional because it allows cable operators to serve as "surrogates" for the government and prohibit indecent programming

³ This particular provision is self-effectuating and therefore became effective December 4, 1992.

⁴ As we stated in the First Report, our actions in this proceeding are limited to section 10's provisions and their implementation and, for this reason, we shall not address the constitutionality of other parts of the new Cable Act or existing Communications Act that are not directly at issue here or properly within the scope of our Notice of Proposed Rule Making.

completely on commercial leased access. Instead, we held that a voluntary policy prohibiting such programming does not constitute state action and, therefore, because section 10(a) does not mandate such cable operator policies, the section does not violate the prohibition on government regulation of speech under the first amendment.⁵

8. With respect to the similar claim that a cable operator's discretion exercised pursuant to section 10(c) is "state action," cable operators are not compelled under that provision to serve as "government surrogates" in prohibiting programming. Cable operators are merely given the freedom to prohibit certain types of program materials if they so choose, just as they are permitted to prohibit indecent programming under section 10(a). Nothing in the language or legislative history of this subsection suggests that Congress meant the additional latitude accorded to cable operators was intended to be mandatory.⁶ Thus, we do not believe that Congress' decision to allow cable operators editorial discretion as provided by the statute constitutes state action.

9. In addition, state action does not exist merely because

⁵ Similarly, we declined to hold that access channels are public forums and thus subject to the state action doctrine. We stated that none of the cases cited by Alliance had held that cable access channels were public forums. We pointed out that, by analogy, commercial leased access is similar in purpose and function to common carriage and that courts had refused to find that the activities of common carriers constitute state action for constitutional purposes. We believe that this same reasoning extends to public access channels on cable systems. Moreover, to the extent that educational and governmental access channels are to be used only by specified local entities, not the public at large, these channels would appear even less akin to public forum facilities.

⁶ For this reason, this provision cannot be said to be "underinclusive," as alleged by Alliance and New York Committee for a Responsible Media because it singles out particular materials on the PEG channels but not on the non-access channels. Cable operators now have the same freedom to prohibit these materials on the PEG channels that they have on the non-access channels. In any event, Congress is free to determine that, in view of the unique attributes of these types of channels and the problems that they pose, cable operators should have this editorial discretion. As Alliance itself points out, "[e]ach method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981), quoting Kovacs v. Cooper, 335 U.S. 77, 97 (1949).

cable operators are no longer immune from liability for obscene programming on access channels. In this regard, commenters argue that the "voluntary" aspect of the provision is removed, and hence is illusory, when coupled with section 10(d)'s removal of cable operator's immunity for obscene programming on access channels. However, by analogy, the fact that a common carrier may not be immune from liability for transmission of obscene materials if it has actual knowledge of the use of its facilities for this purpose in no way renders the activities of a common carrier state action when it prohibits the unlawful transmission of obscene material. Just as federal or state law can require that common carrier facilities be used only for lawful purposes, so too can such laws require that cable access facilities be used only for lawful purposes. Thus, as we explained in the First Report, para. 22 n.22, as with common carriers, a cable operator's decision to ban obscene programming does not constitute state action or even an unlawful restraint merely because the cable operator is subject to potential liability for carriage of obscene programming.

IV. Implementation of Section 10(c)

A. Definition of Statutory Terms

10. The prohibitions which cable operators may impose under Section 10(c) cover "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."⁷ Neither the statute nor the

⁷ In this regard, we note that, to the extent section 10(c) covers materials also covered by section 624(d), section 10(c) permits unilateral action by cable operators, whereas section 624(d) contemplates action pursuant to agreement between cable operators and franchise authorities. In light of that, we disagree with commenters, such as the City of St. Paul, who contend that Congress did not intend section 10(c) to preempt any existing agreements entered into pursuant to section 624(d). The City of St. Paul argues that such prior agreements concerning the manner in which cable operators may exercise control over PEG channels should be viewed as "waiving" cable operator's section 10(c) rights. In view of section 10(c)'s permissive nature, such waivers, it is argued, do not conflict with, and therefore are not preempted by, section 10(c). As a general matter, however, we believe that agreements entered into prior to the effective date of rules implementing section 10(c) would not be viewed as "waiving" future section 10(c) rights unless such a waiver is express. Accordingly, unless the cable operator agrees, or a court determines, that future rights under section 10(c) have been waived through a pre-existing franchise agreement, we believe that Congress intended the new rights accorded by section 10(c) to supersede prior agreements under section 624(d). Further, we do

legislative history provide a definition of these terms. In the Notice, however, we stated that the Senate drafters apparently intended the term programming involving "sexually explicit" conduct to mean the same types of indecent programming material that may be prohibited by cable operators on leased access channels. See para. 13 n.11, citing 138 CONG. REC. S646 (daily ed. Jan. 30, 1992). Similarly, we suggested that the provision relating to "material soliciting or promoting unlawful conduct" may have been intended by Senate drafters to address programming that solicits prostitution. Id.

11. Alliance maintains that the particular restrictions relating to sexually explicit conduct and promoting unlawful conduct are overbroad. It, as well as Acton, states that the term "sexually explicit conduct" omits reference to patently offensive or to community standards. Boston Community Access maintains that this term is overbroad and that the FCC's interpretation is flawed. It argues that the term should be given the same meaning as "obscene." On the other hand, Cox Cable, Intermedia, New York State and others argue that the term should be construed as "indecent" and that the Commission should use the term "indecent" in the rules to avoid confusion and to clarify its meaning. According to Bogue and Lerom, the term should include frontal nudity, nude dancing, sado-masochistic behavior, excretory activities, exposed genitals and fondling.⁸

12. Acton maintains that the term "soliciting or promoting unlawful conduct" is not susceptible to the meaning suggested by the Commission in the Notice since it is not limited to prostitution but includes a vast array of criminal activities such as drug use and illegal gambling. The City of San Antonio states that the rules should clarify and specifically allow these terms to be defined by cable operators and also clarify whether unlawful conduct such as copyright infringement, presenting slanderous materials or violation of other similar laws can themselves be prohibited by cable operators in its policies. New York State says that Commission efforts to clarify this category should recognize that PEG channels are limited to noncommercial use. Alliance maintains that, under Hess v. Indiana, 414 U.S. 105, 108 (1973) and

not believe such an interpretation is unfair to franchise authorities. A franchising authority's ability to impose PEG access requirement and to restrict a cable operator's control over such channels stems from provisions of the Cable Act, and Congress is free to create exceptions to those statutory provisions.

⁸ They also assert that interpretations of this term should be made by local cable advisory committees. See discussion in para. 31, infra, regarding resolution of disputes.

other cases, the U.S. Constitution forbids or proscribes restrictions on speech relating to advocacy of law violations. Santa Barbara echoes this view in stating that this provision would permit cable operators to ban advocacy of civil disobedience or material that might challenge existing laws. Manhattan Neighborhood Network suggests that restriction of the types of materials described in the statute is disturbingly vague and, therefore, urges that the rules should be specific and as narrowly defined as possible.

Discussion

Obscenity

13. At the outset, we conclude that cable operators, in order to exercise the limited degree of discretion allowable under section 10(c), must be apprised of the specific categories of programming they may prohibit and of the meaning that should be ascribed to these categories. Although the legislative history provides some guidance, it does not remove all ambiguity as to the meaning of these terms. With respect to programming "containing obscene materials," we believe that the scope of the this provision should be coextensive with materials that meet the test set forth in Miller v. California, 413 U.S. 15 (1973).⁹ Thus, cable operators should be guided by the Miller obscenity standard in their determinations of what materials fit into the first category.

Sexually Explicit Conduct

14. The second category refers to programming containing "sexually explicit conduct." As noted above, neither the statute nor legislative history provides a definition of this phrase. Although we are urged by some commenters to construe these words to mean "obscene," we believe, as explained below, that a more reasonable construction of the statute would be to interpret these words as meaning "indecent." It is clear from the very words of the statute itself, and from the legislative history, that Congress did not intend the three categories of materials to be construed as either synonymous or interchangeable with each other. Congress clearly meant the third category, promoting or soliciting unlawful conduct, to be something different from the first category, obscene materials. Moreover, there is nothing to suggest that Congress intended the first and second categories to be construed the same;

⁹ Although similar to the indecency standard, the test under Miller also requires findings (1) that the work appeals to the prurient interest and (2) that the work, if taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.

otherwise, Congress' inclusion of "sexually explicit conduct" would be mere surplusage and, hence, unnecessary. Thus, it is our belief that Congress intended each of these categories to be separate and distinct as to their meaning and application.¹⁰

15. Having concluded that Congress meant to ascribe different meanings to each of the terms used, we must discern from congressional intent the meaning that should be ascribed to the second category in section 10(c). As some of the parties point out, some programming may contain "sexually explicit conduct" that is not necessarily "indecent" as we define that term under section 10(b) and as described under section 10(a). Nevertheless, we believe that a construction of "sexually explicit conduct" to mean indecent programming is reasonable, given the purposes underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to "indecent" programming on cable access channels. This fact suggests to us that Congress did not intend to accord this term a meaning different from that of "indecent." In addition, by this interpretation, we think that cable operators and others will be able to discern the meaning of the term more clearly and precisely. In this regard, the courts have previously upheld the Commission's generic definition of "indecent" as sufficiently defined to provide guidance to a person of ordinary intelligence. See Dial Information Services v. Thornburg, 938 F.2d 1535, 1540-41 (2d Cir. 1991). Accordingly, we believe that the same standard applicable under section 10(a) and, as defined by us for purposes of section 10(b), should also govern cable operators' determinations under section 10(c).

Soliciting or Promoting Unlawful Conduct

16. As to the scope of the term "soliciting or promoting unlawful conduct," we believe that the intent underlying the statute is to make clear that if the dissemination of information or material would constitute unlawful solicitation of a crime or would otherwise be illegal under federal, state, or local law, it would also be subject to proscription by cable operators on the PEG access channels.

17. For example, consistent with the legislative history noted above, it would cover solicitation of prostitution where such solicitation is unlawful and therefore a crime. Similarly, it would appear to cover the presentation of materials that are unlawful because they are likely to incite an immediate breach of peace or otherwise incite imminent unlawful action. See, e.g.,

¹⁰ See FCC v. Pacifica Foundation, 438 U.S. 726, 739-740 (1978) (words "obscene, indecent, or profane" in 18 U.S.C. §1464, written in disjunctive, meant to have separate meanings).

Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985), rehearing denied, 764 F.2d 1411. It would also appear to include the making of a threat of bodily harm against a government informant since such threats are subject to punishment under federal law, 18 U.S.C.A. §1513, and have been held not to involve "threats" relating to ideas or advocacy. See U.S. v. Velasquez, 772 F.2d 1348 (7th Cir. 1985), cert. denied, 475 U.S. 1021 (1986). Similarly, the dissemination by any member of the military of secret military intelligence would appear to fit into this category because such dissemination is prohibited to "one not entitled to it" under 18 U.S.C.A. §793. See United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), cert. denied, 109 S.Ct. 259 (1988). In these and analogous circumstances, the cable operator would be free to prohibit these materials on the basis that the disseminations are unlawful. Conversely, this part of the statute would not cover speech that is otherwise protected, e.g., speech advocating civil disobedience that is not directed at inciting or producing imminent lawless action. We believe this interpretation is reasonable and consistent with the intent and purpose underlying this particular provision. For example, we note by analogy that communications common carriers are permitted to prohibit use of their facilities for unlawful purposes.¹¹

B. Cable Operator Discretion under Section 10(c)

18. Continental Cablevision states that section 10(c) should be interpreted to permit cable operators to prohibit some, but not necessarily all, of the types of programs specified in section 10(c). Acton states that since the PEG channel provision is voluntary, operators should have substantial flexibility, including the option to pursue a safe harbor approach for "mature" programming. If a cable operator has the statutory right to ban such programming, Acton asserts, it must have the lesser right to channel it. The City of San Antonio agrees insofar as it advocates rules that allow discretion to schedule programs so that more adult-oriented programming is reserved for later hours. Bogue and Lerom, however, state that the Commission should require that any indecent or sexually explicit programming may be shown only after midnight and before 6 a.m.

Discussion

19. We believe that section 10(c) was intended to afford cable operators broad discretion in deciding how to treat PEG programming covered by section 10(c). Thus, for example, we believe that a cable operator could decide under section 10(c) to

¹¹ See Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 FCC Rcd 2819 (1987).

prohibit only obscene programming from the PEG access channels but not other types of programming described in that subsection. Similarly, we believe that this discretion also allows cable operators to require indecent programming to be shown in the late evening hours, rather than prohibiting such programming entirely. A cable operator could also decide to prohibit such programming on the public access channel but not exercise such control over the other access channels designated by local authorities for educational or governmental use.

20. Further, we believe that a "reasonableness" standard should be read into section 10(c). This will permit cable operators to prohibit programming which they "reasonably believe" falls within the section 10(c) categories. Such an interpretation will ensure that cable operators act in good faith in making such determinations and will further ensure that, where local authorities have authorized PEG channels, materials falling outside the proscribed categories are not unreasonably barred from presentation.

C. Certification as Method of Enforcement of Prohibitions

21. In the Notice, we requested comment on whether it would be appropriate for cable operators to implement their section 10(c) policies by requiring certifications from users that no materials fitting into any of the statutory categories would be presented on these channels.

22. Cable interests were very supportive of a certification approach under section 10(c). Blade Communications favors allowing cable operators to require certification as to whether programming on the PEG channels is obscene and limiting liability for those who comply with regulatory steps for obtaining programmer certification. Similarly, CATA suggests that cable operators should be allowed to require and rely upon certifications from programmers and that the burden to identify such programming should be on programmers. NCTA and other cable interests also believe that cable operators should be able to rely on certifications and should be immunized from liability when doing so. In addition, Nationwide urges that cable operators be allowed to obtain certifications from the party providing programming directly to the cable operator. TCI, also urging a certification approach, says that the Commission should state that cable operators are not liable for non-obscene programming on the access channels.

23. Franchising authorities also were generally receptive toward this approach. For example, the City of Austin states that a certification requirement would be an appropriate mechanism, although it urges the Commission to impose this requirement on the individuals responsible for programming content and to allow public

access managers to administer it. Along similar lines, NATOA states that primary responsibility should be on programmers to identify obscene material and to certify that their programming does not contain obscene or indecent material. In addition, NATOA recommends, as others do, that programmers be permitted to certify on a blanket, as opposed to a program-by-program, basis. The City of Austin, however, advocates that the Commission craft its rules to allow cable operators very little discretion under any program certification process.¹² The City of San Antonio recommends that the new rules place the burden of certification on the producer.

24. Access organizations and access users were either opposed to, or less than enthusiastic about, use of a certification process. For example, Boston Community Access believes that requiring certification for each program would impose a huge new burden of staff work and paperwork on organizations such as itself, especially since there are very few access programs that actually contain material prohibited by the proposed rule. Similarly, Randy Visser maintains that requiring certifications for users of local public access channels is unrealistic and could not be enforced through the local cable regulatory structure. Alliance maintains that there is simply no need for the Commission to require that programmers certify the content of their programs because, in its opinion, operator liability should not be implicated. Other access groups, for example Ann Arbor, state generally that the rules should be specific and narrow so as not to hamper use of access channels by those seeking to provide live or taped programming.

Discussion

25. In the First Report, we stated that cable operators would not be precluded from requiring certifications from providers of leased access programming, as appropriate, under either section 10(a) (relating to a cable operator-enforced prohibition on indecent programming) or section 10(b) (relating to the blocking of indecent leased access programming). We stated that a relatively simple, straightforward certification need not be burdensome nor serve as a deterrent to access users. We believe that the same analysis and conclusions apply to the PEG channels. Accordingly, we will not deny cable operators the right to require

¹² The City of Austin also alleges, as did Alliance, that the Commission's Notice of Proposed Rule Making failed to comply with the Administrative Procedure Act ("APA") and, therefore, urges the Commission to issue a revised Notice. We explained in the First Report the reasons for our belief that the Notice provided adequate notice of our proposals and opportunity to comment consistent with APA requirements. Our rationale and analysis equally pertains to this part of the rulemaking process and, therefore, the City of Austin's arguments are rejected.

certifications that the programming intended for presentation on a PEG channel does not contain material that the cable operator has proscribed under section 10(c). Moreover, as we stated in the First Report, in view of the removal of cable operators' immunity for obscene programming on access channels, permitting a certification requirement is a reasonable approach for this agency to adopt.¹³

26. As suggested by several commenters, we thus believe that it would be permissible for cable operators to require blanket certifications from access users or from an access manager or administrator where the access manager or administrator agrees to assume the certification obligation.¹⁴ This should minimize burdens both for access users and access administrators and managers. Indeed, from the comments received, it appears that a number of access organizations already have in place procedures that require certification statements, or their equivalent, from access programmers.¹⁵ In addition, as suggested by a number of commenters, we believe that cable operators should be permitted to require certifications that reasonable efforts will be used to ensure that no live programming contains material prohibited by a cable operator under section 10(c).¹⁶

V. Resolution of Disputes

27. In the Notice, we asked commenters "to address whether specific procedures should be developed to govern disputes between the cable operator and programmer of these access channels." Because "these channels are mandated and their conditions of use

¹³ Similarly, as permitted in the First Report relating to leased access, we will not deny cable operators the right to request indemnification from access users for the cost and expenses attributable to defending a prosecution for carriage of an alleged obscene program that is certified as "not obscene" by an access programmer.

¹⁴ Access administrators, even if they decide not to certify themselves, could be required by cable operators to undertake the ministerial task of obtaining certifications from users.

¹⁵ See, e.g., Statement of Hudson Community Access Television.

¹⁶ In the First Report, para. 51 n.43, we addressed and rejected arguments that certification requirements impermissibly violate program providers' rights under the first amendment or otherwise. In view of that discussion, we need not address these arguments again.

are defined at the local level," we proposed that "any such disputes should be handled at the local level."

28. Cable operators differ on the question of the appropriate forum for resolution of section 10(c) disputes. For example, Acton argues that individual disputes should be resolved locally, preferably in court, although it would not be opposed to local franchising authorities that assume original jurisdiction over such matters. On the other hand, Intermedia would prefer that disputes over PEG channels and section 10(c) be adjudicated by the Commission.

29. Access organizations and interests argue that procedural safeguards should apply to disputes that arise over the content of material airing on the PEG access channels to ensure that cable operators do not impermissibly prohibit or otherwise restrain the showing of access programming on these channels.¹⁷ Baratta, however, states that all questions of content should be dealt with on the local level.

30. Governmental authorities are virtually unanimous in the view that such matters should be handled at the nonfederal level. For example, New York State maintains that since resolution of such disputes is a nonfederal matter, such matters, i.e., disputes between cable operators and programmers of the PEG channels, should be handled at the local level. Similarly, the City of San Antonio urges that the rules should provide for dispute resolution at the local level. However, the City of Austin argues that where the franchising authority is also the programmer, disputes should be resolved by the Commission but, otherwise, disputes should be handled by the franchising authority. NATOA, on the other hand, favors resolution of disputes in the judicial system, rather than by franchising authorities, at the local level, especially where the franchising authority may be the programmer, editor, or facilitator. The City of Tampa advocates initial review of disputes by the cable operator, followed by referral of unresolved disputes to a citizen advisory committee with appropriate authority, review by the franchising authority and, finally, judicial process.

¹⁷ Some commenters argue that procedural safeguards are required under the Constitution and must be provided if cable operators are allowed to prohibit or otherwise restrain certain types of programming on PEG channels under section 10(c). We have already rejected arguments that according cable operators additional control over their cable systems constitutes impermissible state action. As stated previously, the first amendment and the procedural safeguards pertaining thereto, apply to government, not private, action.

Discussion

31. We believe that, to the extent possible, disputes under section 10(c) should be resolved in accordance with the rules and procedures established by the franchising authority for the operation of these channels. As pointed out earlier, section 611 expressly allows franchising authorities to specify rules and procedures for the PEG access channels and to enforce them. To the extent that a franchise agreement does not provide for resolution of PEG channel disputes, we assume that recourse could be obtained through the local judicial process given the local nature and character of these channels. Indeed, this might be especially appropriate where the dispute is between the franchising authority itself as a programmer or user of the PEG access channel and the cable operator. We see no need for federal intervention in such matters at this time.

VI. Clarification of Aspects of First Report

32. In the First Report, we stated that copies of program provider identifications and/or certifications should be retained for eighteen months. We wish to clarify that, as the rule appendix to the First Report states, the records sufficient to verify cable operator compliance with the blocking requirement should be retained "for a period sufficient to cover the limitations period specified in 47 U.S.C. §503(b)(6)(B)," i.e., twelve months. Thus, the correct record retention period is twelve months as new rule section 76.701(h) provides. We also wish to clarify that while cable operators are required to retain requests to receive or terminate access to the blocked leased access channel for the twelve month period, they shall not make such information available to the public nor maintain such information in their public inspection files. Section 631 of the Communications Act, 47 U.S.C. §551, expressly prohibits cable operators from disclosing "personally identifiable information" about subscribers without their consent. Accordingly, such information should not be included in cable operators' public inspection files.

VII. Final Regulatory Analysis Statement

33. The Need and Purpose of this Action. The regulations in this Second Report and Order are intended to implement that part of the Cable Consumer and Competition Act that directs the Commission to adopt regulations to enable cable operators to prohibit any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct on public, educational, or governmental access channels. The regulations accomplish this by allowing cable operators to prohibit such materials.

34. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis. Boston Community commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on these entities and persons, their comments were not specifically directed to the Initial Regulatory Flexibility Analysis.

35. Significant Alternatives Considered and Rejected. In this Second Report, we have considered the most efficacious manner of implementing section 10(c) without imposing unreasonable burdens on the various entities involved. Although a number of commenters alleged that a certification approach as suggested in the Notice of Proposed Rule Making would significantly increase burdens on administrators, managers, and users of the public, educational, and governmental access channels and, therefore, would not be appropriate, we have concluded that Congress gave cable operators broad discretion under section 10(c). Consistent with this approach, cable operators are permitted to require blanket, rather than program-by-program, certifications in an effort to ease burdens that might otherwise occur. Finally, the fact that a number of access organizations that administer or manage public access channels already have procedures similar to a certification process in place should further minimize the burdens under this approach.

VIII. Conclusion

36. Congress has directed us to adopt rules to enable cable operators to prohibit certain types of materials on the public, educational, and governmental access channels of cable systems. We believe that our action herein accomplishes this goal by balancing the respective interests of cable operators, access users and viewers in a manner designed to lessen the burdens for all interests alike.

IX. Ordering Clauses

37. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub. L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934,

as amended, Part 76 of the Commission's Rules IS AMENDED, as set forth in Appendix A below, effective 30 days from the date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX A

FINAL RULE

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 611-612, as amended, 106 Stat. §1460, 47 U.S.C. §531-532

2. Part 76 is amended by adding at the end of Subpart L -- "Cable Television Access" new section 76.702 which reads as follows:

§76.702 Public, Educational and Governmental Access. Any cable operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, indecent material as defined in section 76.701(g), or material soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. A cable operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

APPENDIX B

COMMENTS

Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM, Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association ("Acton")

Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way (jointly) ("Alliance")

Ann Arbor Community Access Television

Arizona Cable Television Association*

Baratta, Mark Conrad*

Biddeford Public Access Corp.*

Blade Communications, Inc.; Multivision Cable TV Corp.; Parcable, Inc.; Providence Journal Company; and Sammons Communications, Inc. (jointly) ("Blade Communications")

Bogue, Virginia B. and Amy Lorum* ("Bogue and Lorum")

Boston Community Access and Programming Foundation ("Boston Community Access")

Capital Community Television, Salem, Oregon

City of Austin, Texas*

City of Cleveland Heights*

City of San Antonio, Texas

City of Santa Barbara*

City of Tampa, Florida

Cole, Roxie, Lee

Columbus Community Cable Access, Inc.

Community Access Network, Incorporated

Community Antenna Television Association, Inc. ("CATA")

Continental Cablevision, Inc. ("Continental Cablevision")

Cox Cable Communications ("Cox Cable")

Crandall, Judy

Defiance Community Television

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Dreety, David B.

Ducarpe, Ron*

Fortriede, Steven C., Associate Director, Allen County Public Library, Fort Wayne, Indiana

Hillsborough County Board of County Commissioners

Hudson Community Access Television*

Inter-Comm Network

Intermedia Partners ("Intermedia")

Manhattan Neighborhood Network

Metropolitan Area Communications Commission*
 Multnomah Community Television
 National Association of Telecommunications Officers and Advisors,
 National League of Cities, United States Conference of Mayors
 and the National Association of Counties ("NATOA")
 National Cable Television Association, Inc. ("NCTA")
 Nationwide Communications Inc. ("Nationwide Communications")
 New York State Commission on Cable Television ("New York State")
 Neuman-Scott, Mark*
 Nutmeg Public Access Television, Inc.
 Rhoda, Carolyn*
 Seffren, David A.*
 Tele-Communications, Inc. ("TCI")
 Time Warner Entertainment Company, L.P. ("Time")
 Visser, Randy, Director SPTV
 Waycross Community Television

REPLY COMMENTS

Acton Corp., Allen's Television Cable Service, Cable Television
 Association of Maryland, Delaware and District of Columbia,
 Century Communications Corp., Columbia International, Inc.,
 Florida Cable Television Association, Gilmer Cable Television
 Company, Inc., Greater Media, Inc., Helicon Corp., Jones
 Intercable, Inc., KBLCOM Inc., Monmouth Cablevision Assoc.,
 TeleCable Corporation, Texas Cable TV Association, United Video
 Cablevision, Inc., West Virginia Cable Television Association,
 Western Communications, Inc. ("Acton")
 Alliance for Community Media, The Alliance for Communications
 Democracy, The American Civil Liberties Union and People for
 the American Way ("Alliance")
 Austin Community Television, Inc.
 Baus, Janet
 Cambridge Community Television
 Channon, David
 Cincinnati Community Video, Inc.
 City of Austin, Texas
 City of St. Paul
 Columbus Community Cable Access, Inc.
 Community Antenna Television Association, Inc.
 Denver Area Educational Telecommunications Consortium, Inc.
 ("Denver Access")
 Friendly, Joe
 Malden Access Television*
 Mollberg, Erik S.
 Motion Picture Association of America, Inc. ("MPAA")
 Multnomah Community Television
 National Association of Telecommunications Officers and Advisors,
 National League of Cities, United States Conference of Mayors,
 and the National Association of Counties ("NATOA")
 National Cable Television Association ("NCTA")

New York Citizens Committee For Responsible Media*

Northrup, Dan

Nunez, Fred

Olelo: The Corporation

Rancho Palos Verdes City Council*

Staten Island Community Television

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Tucson Community Cable Corporation

Tsuno, Keiko

Viacom International Inc. ("Viacom")

Vitiello, Marisa

Waycross Community Television

Wyrod, Robert

*** Informal comment or informal reply comment**